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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASTE ACTION PROJECT,)	
)	
Plaintiff,)	
v.)	COMPLAINT
)	
)	
KIEWIT/GENERAL/MANSON, A JOINT)	
VENTURE: KIEWIT CORPORATION;)	
GENERAL CONSTRUCTION)	
COMPANY; and MANSON)	
CONSTRUCTION CO.,)	
)	
Defendants.)	
)	

I. INTRODUCTION

1. This action is a citizen suit brought under Section 505 of the Clean Water Act (“CWA”) as amended, 33 U.S.C. § 1365. Plaintiff Waste Action Project seeks a declaratory judgment, injunctive relief, the imposition of civil penalties, and the award of costs, including attorneys’ and expert witnesses’ fees, for Defendants Kiewit/General/Manson, a Joint Venture’s, Kiewit Corporation’s, General Construction Company’s, and Manson Construction Co.’s (collectively, “K/G/M”) repeated and ongoing unlawful acts proscribed by Section 301(a) of the

1 CWA, 33 U.S.C. § 1311(a), specifically, the discharge of dredged or fill material into navigable
2 waters without authorization by a permit issued under Section 404, 33 U.S.C. § 1344, by the
3 United States Army Corps of Engineers (“COE”). .

4 **II. JURISDICTION AND VENUE**

5 2. The Court has subject matter jurisdiction under Section 505(a) of the CWA, 33
6 U.S.C. § 1365(a). The relief requested herein is authorized by 33 U.S.C. §§ 1319(d) and
7 1365(a).
8

9 3. Under Section 505 (b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), Plaintiff
10 notified Defendants of Defendants’ violations of the CWA and of Plaintiff’s intent to sue under
11 the CWA by letters dated and postmarked April 26, 2013 and delivered approximately April 30,
12 2013 (“Notice Letter”). A copy of the Notice Letter is attached to this complaint as Exhibit 1.
13 The allegations in the Notice Letter are incorporated herein by this reference. Plaintiff notified
14 the Defendants’ Registered Agents, the Administrator of the United States Environmental
15 Protection Agency (“USEPA”), the Administrator of USEPA Region 10, and the Director of the
16 Washington Department of Ecology (“WDOE”) of its intent to sue Defendants by mailing copies
17 of the Notice Letter to these officials on April 26, 2013.
18
19

20 4. More than sixty days have passed since the notice was served and the violations
21 complained of in the Notice Letter are continuing or are reasonably likely to continue to occur.
22 Defendants are in violation of the CWA. No agency has commenced any action constituting
23 diligent prosecution to redress these violations.
24

25 5. The source of the violations complained of is located in King County,
26 Washington, within the Western District of Washington, and venue is therefore appropriate in
27
28

1 the Western District of Washington pursuant to Section 505(c)(1) of the CWA, 33 U.S.C. §
2 1365(c)(1).

3 **III. PARTIES**

4 6. Plaintiff, Waste Action Project, is suing on behalf of itself and its members.
5 Waste Action Project is a non-profit corporation organized under the laws of the State of
6 Washington. Waste Action Project is a membership organization and has at least one member
7 who is injured by Defendants' violations. Waste Action Project is dedicated to protecting and
8 preserving the environment of Washington State, especially the quality of its waters.
9

10 7. Plaintiff has representational standing to bring this action. The recreational,
11 economic, aesthetic and/or health interests of Waste Action Project and its members have been,
12 are being, and will be adversely affected by Defendants' violations of the CWA. The relief
13 sought in this lawsuit can redress the injuries to these interests.
14

15 8. Defendant Kiewit/General/Manson is a joint venture formed for the SR 520
16 construction project, comprising defendants Kiewit Corporation, General Construction
17 Company, and Manson Construction, which are corporations authorized to conduct business
18 under the laws of the State of Washington.
19

20 9. For their SR 520 construction project, Defendants operate tugboats on Lake
21 Washington in and around the Kenmore Navigation Channel where the violations of the CWA
22 took place.
23

24 **IV. FACTS**

25 10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of
26 pollutants by any person, unless in compliance with the provisions of the CWA. Section 301(a)
27
28

1 prohibits, inter alia, such discharges not authorized by Section 404 of the CWA, 33 U.S.C. §
2 1344.

3 11. Section 404 of the CWA, 33 U.S.C. § 1344, provides the United States Army
4 Corps of Engineers (“COE”) with the authority to implement the permit program for the
5 discharge of dredged or fill material into navigable waters.
6

7 12. Defendants have violated and continue to violate Section 301(a) of the CWA, 33
8 U.S.C. §§ 1311(a), by discharging dredged or fill material to the waters of the United States,
9 which remains in place, without the required permit from COE under Section 404, 33 U.S.C. §
10 1344.
11

12 13. Lake Washington is a navigable waterbody located in King County, Washington.

13 14. K/G/M operates or controls tugboats in Lake Washington in support of
14 construction operations at the Kenmore Yard, 6423 NE 175th St., Kenmore, WA 98028, which
15 are part of the SR 520 Evergreen Point Floating Bridge Project. These operations occur in and
16 around the Kenmore Navigation Channel, including the areas of Lake Washington in front of the
17 Kenmore Air and Northlake Marina facilities.
18

19 15. In the course of K/G/M’s tugboat operations, the propellers and hulls of the
20 tugboats stir up sediment and other materials from the bottom of Lake Washington and thereafter
21 discharge the sediment and other materials into Lake Washington. That sediment and other
22 materials is then redeposited at other locations on the bottom of Lake Washington, including the
23 lakebed under the Northlake Marina. K/G/M operates or controls these tugboats and causes the
24 discharge of sediment and other materials, which constitutes dredged material, on a daily basis.
25
26
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29

1 16. K/G/M's operations have resulted in visible plumes of turbidity in Lake
2 Washington, which have caused members of the public who live near and recreate and in Lake
3 Washington to be seriously concerned about the effects on water quality, wildlife, and recreation.

4 17. K/G/M's discharges of dredged material into Lake Washington resulted in the
5 Washington Department of Ecology's issuance of a notice of violation of water quality standards
6 on or about December 28, 2012. The Washington Department of Ecology also issued an
7 Administrative Order taking an enforcement action against K/G/M on or about May 28, 2013,
8 thereby requiring K/G/M to take certain actions to address these violations of water quality
9 standards.
10

11 18. The Washington Department of Ecology has documented at least two occasions
12 where K/G/M tugboats have caused visible sediment suspension in the Kenmore Navigation
13 Channel.
14

15 19. During the course of K/G/M's tugboat operations, tugboats have run aground and
16 become stuck in the lakebed of Lake Washington. These groundings and efforts to refloat
17 tugboats result in exacerbated disturbance of lake bottom sediments and other materials and their
18 discharge.
19

20 20. The dredged material that K/G/M has discharged into Lake Washington remains
21 in place at lakebed locations different from where the material was before tugboat activities.
22

23 21. K/G/M's discharges of dredged material have resulted in the accumulation of
24 dredged material at the Northlake Marina. The accumulation of dredged material impairs the
25 ability to move and maneuver boat(s) in slips at the marina at all or without additional
26 disturbance of redeposited material..
27

1 22. The vicinity of the discharge and the affected waters are used by the citizens of
2 Washington and visitors, as well as at least one of Plaintiff's members, for recreational activities,
3 including swimming, boating, biking, fishing and nature watching, and educational activities.
4 Plaintiff's member(s) also derive(s) aesthetic benefits from the affected waters. Plaintiff's and
5 its members' enjoyment of these activities and waters is diminished by the degraded state of the
6 affected waters and by Defendants' contributions to such degraded state. For example,
7 Plaintiff's members are concerned that Defendants' violations have caused water quality
8 violations in Lake Washington and harm wildlife, including salmon, which use Lake
9 Washington.
10

11 23. Defendants have violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by
12 discharging dredged or fill material to navigable waters without a permit issued under Section
13 404, 33 U.S.C. § 1344. Defendants' violations of the CWA are additionally set forth in the
14 Notice Letter, attached hereto as Exhibit 1, and are incorporated herein by this reference.
15 Defendants' violations are ongoing as the dredged or fill material they discharged to navigable
16 waters remains, and Defendants have obtained no Section 404 permit coverage.
17

18 24. Defendants' violations of the CWA degrade the environment and the water
19 quality of the receiving water bodies.
20

21 25. Defendants' violations were avoidable had Defendants been diligent in complying
22 with their legal obligations.
23

24 26. Defendants have benefited economically as a consequence of their violations and
25 their failure to implement improvements during tug and barge operations.
26

27. Neither the Department of Ecology, the United States Environmental Protection Agency, or COE have taken any enforcement action against Defendants for Defendants' unpermitted discharge in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

V. CAUSE OF ACTION

28. The preceding paragraphs and the allegations in the Notice Letter are incorporated herein.

29. Defendants' violations of the CWA described herein and in the Notice Letter constitute illegal activity proscribed by section 301 of the Clean Water Act, 33 U.S.C. §§ 1311. An unlawful act under section 301 constitutes an "effluent standard or limitation," violation of which is enforceable by Plaintiff under Section 505(a)(1), 33 U.S.C. § 1365(a)(1).

30. On information and belief, the violations committed by Defendants are ongoing or are reasonably likely to continue to occur. Any and all additional violations of the CWA which occur after those described in Plaintiff's Notice Letter but before a final decision in this action should be considered continuing violations subject to this Complaint.

31. Without the imposition of appropriate civil penalties and the issuance of an injunction, Defendants are likely to continue to violate the CWA to the further injury of the Plaintiff, its member(s) and others.

32. A copy of this Complaint is being served upon the Attorney General of the United States and the Administrator of the USEPA as required by 33 U.S.C. § 1365(c)(3).

VI. RELIEF REQUESTED

Wherefore, Plaintiff respectfully requests that this Court grant the following relief:

A. Issue a declaratory judgment that Defendants have violated and continue to be in violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, for discharging dredged or

1 fill material to navigable waters without the permit required under Section 404, 33 U.S.C. §
2 1344;

3 B. Enjoin Defendants from conducting additional tug and barge activities in a
4 manner that results in further violations of the Clean Water Act;

5 C. Order Defendants to take specific actions to remediate the environmental harm
6 caused by its violations;

7 D. Order Defendants to pay civil penalties of \$37,500.00 per day of violation for
8 each violation committed by Defendants pursuant to Sections 309(d) and 505(a) of the CWA, 33
9 U.S.C. §§ 1319(d) and 1365(a), and 40 C.F.R. § 19;

10 H. Award Plaintiff their litigation expenses, including reasonable attorneys' and
11 expert witness fees, as authorized by Section 505(d) of the CWA, 33 U.S.C. § 1365(d); and

12 I. Award such other relief as this Court deems appropriate.

13 RESPECTFULLY SUBMITTED this 10th day of September, 2013.

14
15
16
17 **SMITH & LOWNEY, PLLC**

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20 Attorneys for Plaintiff
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EXHIBIT 1

SMITH & LOWNEY, P.L.L.C.

2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

April 26, 2013

Via Certified Mail - Return Receipt Requested

Managing Agent
Kiewit/General/Manson, a Joint Venture
3015 112th Ave. NE, Ste. 100
Bellevue, WA 98004

Via Certified Mail - Return Receipt Requested

Managing Agent
Kiewit Corporation
33455 6th Ave. S.
Federal Way, WA 98003

Via Certified Mail - Return Receipt Requested

Managing Agent
General Construction Company
33455 6th Ave. S.
Federal Way, WA 98003

Via Certified Mail - Return Receipt Requested

Managing Agent
Manson Construction Co.
P.O. Box 24067
Seattle, WA 98124

Re: **NOTICE OF INTENT TO FILE SUIT UNDER THE CLEAN WATER ACT**

Dear Managing Agents:

This sixty day notice of intent to file a citizen suit against Kiewit/General/Manson, a Joint Venture, Kiewit Corporation, General Construction Company, and Manson Construction Co. (collectively, "K/G/M") under Section 505 of the Clean Water Act ("CWA"), 33 USC § 1365, for the violations described below is served on behalf of Waste Action Project, P.O. Box 4832, Seattle, WA 98194, (253) 639-7245. Any response to this letter should be addressed to the undersigned counsel for Waste Action Project at the letterhead address.

K/G/M has violated and continues to violate Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and 1344, by discharging dredged material to the waters of the United States without the required permit from the United States Army Corps of Engineers. This dredged material has been discharged in the course of tugboat operations in Lake Washington

in and near the Kenmore Navigation Channel, including the areas of Lake Washington in front of the Kenmore Air and Northlake Marina facilities. The tugboat operations support K/G/M activities at the Kenmore Yard, 6423 NE 175th St., Kenmore, WA 98028. Some of the tugboat activities at issue were the subject of notice of violation no. 9652 issued by the Washington Department of Ecology to Kiewit/General/Manson, a Joint Partnership, on December 28, 2012. Specifically, K/G/M operates tugboats in and near the Kenmore Navigation Channel in a manner that results in the disturbance, suspension, and redeposit of lake bottom sediments by tugboat propellers, propeller wash, and hull movement. These tugboat operations are effectively dredging the Kenmore Navigation Channel and surrounding waters, which are not always deep enough for tugboat navigation without sediment disturbance. The disturbance and redeposition of sediment causes significant water quality impacts and degradation, including violation of turbidity water quality criteria. See WAC 173-201A-200(e).

The tugboat operations result in the excavation of sediment from the lake bottom and its redeposit in surrounding locations. This constitutes the discharge of dredged material. See 33 C.F.R. § 323.2(d). A permit from the United States Army Corps of Engineers is required for this discharge. See 33 C.F.R. § 323.3(a) and 33 U.S.C. § 1344. K/G/M has no such permit for this discharge, so it violates the Clean Water Act. See 33 U.S.C. § 1311(a).

K/G/M's violation of the Clean Water Act by the unpermitted discharge of dredged material has taken place on a daily basis since approximately March 2012, including on the following particular dates:

March 3, 2012	June 4, 2012	Sept. 26, 2012
March 4, 2012	June 7, 2012	Sept. 29, 2012
March 8, 2012	June 18, 2012	October 2, 2012
March 19, 2012	June 19, 2012	October 3, 2012
March 21, 2012	June 20, 2012	October 14, 2012
March 25, 2012	June 22, 2012	Nov. 12, 2012
March 28, 2012	June 28, 2012	Nov. 28, 2012
March 29, 2012	June 29, 2012	Nov. 29, 2012
April 2, 2012	July 1, 2012	Dec. 6, 2012
April 8, 2012	July 10, 2012	Dec. 13, 2012
April 9, 2012	July 20, 2012	Dec. 14, 2012
April 10, 2012	July 23, 2012	Dec. 18, 2012
April 11, 2012	July 24, 2012	Dec. 19, 2012
April 12, 2012	July 26, 2012	Dec. 20, 2012
April 13, 2012	August 1, 2012	January 2, 2013
April 16, 2012	August 2, 2012	January 3, 2013
April 18, 2012	August 14, 2012	January 4, 2013
April 21, 2012	August 16, 2012	January 7, 2013
April 25, 2012	Sept. 12, 2012	January 8, 2013
April 30, 2012	Sept. 18, 2012	January 9, 2013
May 3, 2012	Sept. 19, 2012	January 10, 2013
May 25, 2012	Sept. 20, 2012	January 14, 2013

January 22, 2013	February 19, 2013	March 17, 2013
January 24, 2013	February 27, 2013	March 18, 2013
January 25, 2013	February 28, 2013	April 6, 2013
February 7, 2013	March 1, 2013	April 12, 2013
February 11, 2013	March 6, 2013	April 15, 2013
February 13, 2013	March 7, 2013	April 16, 2013
February 15, 2013	March 14, 2013	
February 18, 2013	March 16, 2013	

The above-described violations reflect only what information currently available to us indicates. These violations are ongoing both because the tugboat operations resulting in the unpermitted discharges are likely to continue and because the discharged dredged material remains in the locations where it has been redeposited while K/G/M continues to have no permit issued under 33 U.S.C. § 1344. We intend to sue for all violations, including those yet to be uncovered and those committed after the date of this notice of intent to sue.

Under Section 309(d) of the CWA, 33 USC § 1319(d), and 40 C.F.R. 19, each of the above-described violations subjects the violator to a penalty of up to \$37,500 per day. In addition to civil penalties, we will seek injunctive relief under Sections 505(a) and (d) of the CWA, 33 USC § 1365(a) and (d), and such other relief as is permitted by law. Also, Section 505(d) of the CWA, 33 USC § 1365(d), permits prevailing parties to recover costs including attorney's fees.

Waste Action Project believes that this NOTICE OF INTENT TO SUE sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit against Kiewit/General/Manson, a Joint Venture, Kiewit Corporation, General Construction Company, and Manson Construction Co. under Section 505(a) of the Clean Water Act for violations.

During the 60-day notice period, we would be willing to discuss effective remedies for the violations in this letter and settlement terms. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

Very truly yours,

SMITH & LOWNEY, P.L.L.C.

By: 

Richard A. Smith
Elizabeth Zultoski

Cc (via certified mail, return receipt requested):

Bob Perciasepe, Acting Administrator, U.S. EPA
Dennis McLerran, Region 10 Administrator, U.S. EPA
Ted Sturdevant, Director, Washington Department of Ecology
CT Corporation System, 505 Union Ave. SE, Ste. 120, Olympia, WA 98501
Richard L. Dolmseth, 5209 E. Marginal Way S., Seattle, WA 98134